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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

13 SAMUEL DIGIACOMO,

CASE NO. C-08-01768 MHP

14 Plaintiff,

PLAINTIFF'S MEMORANDUM OF POINTS  
 AND AUTHORITIES IN OPPOSITION TO  
 DEFENDANT'S MOTION TO COMPEL  
 ARBITRATION AND TO DISMISS OR,  
 ALTERNATIVELY, STAY CASE

15 v.

16 EX'PRESSION CENTER FOR NEW  
 MEDIA, INC., d/b/a EX'PRESSION

Date: September 8, 2008

17 COLLEGE FOR DIGITAL ARTS, and  
 Does 1 through 100,

Time: 2:00 P.M.

18 Defendant.

Location: Courtroom 15, 18th Floor  
 450 Golden Gate Ave.

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Judge: San Francisco, CA 94102  
 Hon. Marilyn Hall Patel

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1           **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2       Plaintiff Samuel DiGiacomo (“Samuel”), a young man who suffers from Asperger’s  
3       Syndrome and Bipolar Disorder, has brought this lawsuit to challenge his expulsion from  
4       Ex’pression College For Digital Arts (“Ex’pression”). He claims that the decision to expel him  
5       was undertaken in a manner that violated several federal and state laws. (See Complaint, 1 – 13.)

6       At the time he enrolled at Ex’pression, Samuel signed a printed Enrollment Agreement  
7       form that contains an arbitration provision. Ex’pression now moves to compel arbitration  
8       pursuant to that provision. As we demonstrate below, that motion should be denied because it is  
9       factually defective, because Samuel’s causes of action are outside the scope of the arbitration  
10      provision Expression seeks to enforce, and because that provision is unconscionable.

11      Ex’pression’s motion is based in part on accusations that are completely irrelevant and are  
12      not supported by any evidence or any citation to the record of this case, all in flagrant violation of  
13      the rules of this Court. (Statement of Facts, *infra*, at note 1.) Moreover, Ex’pression’s motion  
14      ignores relevant facts concerning the circumstances under which the Enrollment Agreement was  
15      executed and the commercial arbitration procedures Ex’pression is attempting to enforce.  
16      (Statement of Facts, *infra*.)

17      Whether Samuel’s claims come within the scope of the arbitration provision Ex’pression  
18      seeks to enforce and whether that provision is unconscionable are issues for this Court to decide.  
19      Ex’pression’s contention that an arbitration agreement, once made, is not judicially reviewable is  
20      plainly wrong. (Argument, *infra*, Part A.)

21      The causes of action alleged in Samuel’s complaint do not come within the scope of the  
22      arbitration provision. Those causes of action challenge his *expulsion*; the arbitration provision  
23      applies, by its own terms, only to “enrollment” issues. (*Id.*, Part B.)

24      Further, the arbitration provision Ex’pression seeks to enforce is both procedurally and  
25      substantively unconscionable. (*Id.*, Parts C-1 and C-2.)

26      Ex’pression has chosen to ignore the unconscionability issues thus far, despite being put  
27      on notice of those issues by a letter from Samuel’s counsel sent well before Ex’pression filed this  
28      motion. In the event that Ex’pression’s reply papers raise any genuine issues of material fact,

1 those issues should be resolved by jury trial. (*Id.*, Part D.)

2 Even if this Court were to grant Ex'pression's motion to compel arbitration, the Court  
 3 should deny its motion to dismiss the case, and should instead stay this case until arbitration is  
 4 completed. (*Id.*, Part E.)

5 **II. STATEMENT OF FACTS<sup>1</sup>**

6  
 7 Samuel is a young man who suffers from Asperger's Syndrome, a form of autism  
 8 characterized by, among other traits, difficulty with social interactions. He also suffers from  
 9 Bipolar Disorder, commonly referred to as manic-depression. Prior to becoming an Ex'pression  
 10 student, he had no education beyond high school. (Declaration of Samuel DiGiacomo, submitted  
 11 herewith ["Samuel Dec."], 2:3 – 2:10 and 2:27 – 3:2.)

12 On September 18, 2006, Samuel went to Ex'pression to begin the process for being  
 13 admitted as a student. He was accompanied by his mother, Jacqueline DiGiacomo ("Mrs.  
 14 DiGiacomo"). They met with Clint Schahrer in the Ex'pression Admissions Office. Mrs.  
 15 DiGiacomo informed Mr. Schahrer that Samuel had Asperger's Syndrome and Bipolar Disorder;  
 16 both disorders and the medications he was taking for them were noted in the Student Health  
 17 Notice form Samuel filled out and submitted to Ex'pressions that day. (Samuel Dec., 1: 24 – 2:10  
 18 and Exhibit A; Declaration of Jacqueline DiGiacomo, submitted herewith ["J. DiGiacomo Dec."],  
 19 1:26 – 2:7.)

20 Samuel was also given a number of other Ex'pression forms to fill out and return. When  
 21 he had done so and had taken a short test, Ex'pression admitted him as a student and he applied  
 22 for financial aid. The entire enrollment process from the time he and his mother arrived at

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23  
 24 <sup>1</sup> Unfortunately, Ex'pression has seen fit to include in its Statement of Facts a number of sensational accusations  
 25 concerning conduct Samuel allegedly engaged in sometime after his enrollment. (Def. Mem., 3:23 – 4:9.) Those  
 26 accusations are clearly irrelevant to the issue raised by Ex'pression's motion, which is simply whether Samuel's  
 27 claims against Ex'pressions should be arbitrated or not. Moreover, those accusations are not supported by citation to  
 28 the record or by any evidence whatsoever, all in violation of the rules of this Court. (See Civil Local Rule 7-5(a).) It  
 [Attachment B hereto].)

1 Ex'pression until their departure took approximately two hours. (Samuel Dec., 1:24 – 3:11; J.  
 2 DiGiacomo Dec., 1:26 – 3:27.)

3 Among documents he filled out and returned that day was a printed Enrollment  
 4 Agreement form. A copy is set forth in Attachment A hereto for convenient reference.<sup>2</sup> As  
 5 requested, he signed it in the seven places that called for his initials or signature. The Enrollment  
 6 Agreement begins with an introductory section that contains the following language in bold-face  
 7 11-point type:

8  
 9           **Any questions or problems that are not satisfactorily answered**  
 10           **or resolved by the school should be directed to the Bureau of**  
 11           **Private Postsecondary and Vocation Education, 1625 North**  
 12           **Market Blvd., Suite S202, Sacramento CA 95834.**

13 (Attachment A hereto, at page 1.)

14           The printed Enrollment Agreement form then recites that the student (in this case,  
 15           Samuel) has “been given a copy of the complaint and grievance procedure.” (*Ibid.*) It is not clear  
 16           whether this is a reference to a complaint and grievance procedure established by Ex'pression or  
 17           the above-mentioned state agency, but in any event Samuel did not receive any copy of any  
 18           procedures to which the Enrollment Agreement may be referring.<sup>3</sup>

19           On the second page of the Enrollment Agreement is a provision that pertains to  
 20           arbitration. Unlike the introductory language just quoted, the arbitration provision is not set forth  
 21           in 11-point or boldface type, but is instead set forth in 9-point regular type. (*Id.*, page 2 at section  
 22           6.1.) Whereas the introductory language pertains to “any questions or problems” a student may  
 23           have, the arbitration provision pertains only to disputes “arising from *enrollment*.” (*Ibid.*,  
 24           emphasis added.)

25           Ex'pression did not inform Samuel or his mother that the Enrollment Agreement

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26           <sup>2</sup> The Enrollment Agreement is authenticated and set forth in declarations submitted herewith. (Samuel Dec., 2:11 –  
 27           2:19 and Exhibit B; J. DiGiacomo Dec. 3:14 – 3:23 and Exhibit B.)

28           <sup>3</sup> Samuel's attorneys requested Ex'pressions to provide the “copy” in question more than two months ago, but that  
 29           request has not been granted. (Clarke Dec., ¶ 3 and Exhibit A.)

1 contained the above-mentioned arbitration provision, or even mention the subject of arbitration,  
2 prior to the enrollment process on September 18, 2006, during that enrollment process, or at any  
3 time between his enrollment and the commencement of this litigation. (Samuel Dec., 2:11 – 2:24;  
4 J. DiGiacomo Dec., 3:8 – 3:23.)

5 The arbitration provision set forth in the Enrollment Agreement states that such  
6 arbitrations are to be conducted by the American Arbitration Association “under its Commercial  
7 Rules.” Those “Commercial Rules” are not further identified. It is thus unclear whether they are  
8 the ones that were in effect at the time the Enrollment Agreement was signed (September 18,  
9 2006), the ones that are in effect on the date a claim is made, the ones that are in effect now, or  
10 the ones in effect at some other time. (See Attachment A hereto, page 2 at ¶ 6.1.)

11 Ex’pression has never provided Samuel or his mother with a copy of any such AAA  
12 Commercial Rules. Additionally, Ex’pression has never discussed with Samuel or his mother the  
13 differences between the judicial remedies that would be available to Samuel in court and the  
14 remedies that would be available to him pursuant to the AAA’s Commercial Rules. (Samuel  
15 Dec., 2:11 – 2:24; J. DiGiacomo Dec., 3:8 – 3:23.)

16 In its motion to compel arbitration Ex’pression does not identify the AAA Commercial  
17 Rules that supposedly govern the arbitration it seeks, much less provide this Court with a copy of  
18 them. (See Def. Mem.; Sinrod Dec.; Thompson Dec.)

19 The Commercial Rules of the American Arbitration Association that are in effect at the  
20 present time provide as follows:

21 • They require that a party filing a claim pay an Initial Filing Fee of \$750 if the claim is  
22 between \$0 and \$10, 000, and require the claimant to pay even larger fees if the claim is  
23 more than \$10,000. For example, a claimant seeking more than \$1 million is required to  
24 pay an Initial Filing Fee of at least \$8,000. (Clarke Dec., ¶ 2 and Exhibit A, pages 20  
25 [Rule 49] and 26 [Fees schedule]<sup>4</sup>.)

26  
27  
28 <sup>4</sup> The AAA apparently has discretion, but is not required, to defer or reduce administrative fees “in the event of  
extreme hardship.” (*Id.* at page 20 [Rule 49].)

- They require that when a case proceeds to the first hearing a Case Service Fee of at least \$200 is payable; like the Initial Filing Fee, Case Service Fees increases with the size of the claim. For example, a claimant who seeks more than \$1 million is required to pay a Case Service Fee of at least \$3,250. (*Id.*, page 26 [Fees].)
- They require that the arbitrator be “compensated at a rate consistent with the arbitrator’s stated rate of compensation.” (*Id.*, page 20 [Rule 51].)
- They do not require that the prevailing party be awarded the Initial Filing Fee, Case Service Fee, arbitrators fee or any other cost the prevailing party has incurred. Instead, these rules give the arbitrator discretion to assess and apportion all fees, expenses and compensation “as the arbitrator deems is appropriate.” (*Id.*, page 18 [Rule 43 (b) and (c)].

On April 7, 2007, after he had successfully completed four semesters, Ex'pression informed Samuel that he was expelled. (Samuel Dec., 3:12 – 3:14; J. DiGiacomo Dec., 4:2 – 4:3.)

This lawsuit and Ex'pression's motion to compel arbitration followed.

On June 11, 2008, Samuel's attorneys sent counsel for Ex'pression a letter that, inter alia, requested a copy of the "complaint and grievance procedure" referred to on the first page of the

Enrollment Agreement and put Ex'pression on notice of Samuel's contention that the arbitration provision is procedurally and substantively unconscionable. (Clarke Dec., ¶ 3 and Exhibit B at pages 1 -2.)

### **III. ARGUMENT**

**A. The Scope Of The Arbitration Provision And Whether The Arbitration Provision Is Unconscionable Are Issues To Be Decided By This Court.**

There is no dispute that both parties signed the Enrollment Agreement, that the Enrollment Agreement contains an arbitration provision, and that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, applies to it. Ex'pression apparently contends that, once it is determined that an arbitration agreement "exists," this Court is absolutely required to compel arbitration. (Def. Mem., 4:24–6:17.) In effect, Ex'pression is saying that arbitration agreements, once made, are

1 not judicially reviewable. That audacious argument is plainly wrong.

2 Whether the claims asserted in a lawsuit come within the scope of an arbitration provision  
 3 is an issue for the courts to decide. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83  
 4 (2002) (“The question of whether the parties have submitted a particular dispute to arbitration,  
 5 e.g., the ‘*question of arbitrability*’ is ‘an issue for judicial determination [u]nless the parties  
 6 clearly and unmistakably provide otherwise.’” (alteration in original, citation omitted); *John*  
 7 *Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) (“the duty to arbitrate being of  
 8 contractual origin, a compulsory submission to arbitration cannot precede judicial determination  
 9 that the ... agreement does in fact create such a duty.”); *Nagrampa v. Mailcoups, Inc.*, 469 F.3d  
 10 1257, 1268 (9<sup>th</sup> Cir. 2006) (*en banc*) (“The arbitrability of a particular dispute is a threshold issue  
 11 to be decided by the courts.”); *Geoffroy v. Washington Mutual Bank*, 484 F.Supp.2d 1115, 1118  
 12 (S.D. Ca. 2007).<sup>5</sup>

13 The arbitration provision at issue in this case applies only to disputes “arising from  
 14 *enrollment*” at Ex’pression. (Attachment A, page 2 [¶ 6.1, emphasis added]). That provision  
 15 stands in sharp contrast to the general resolution procedure - set forth in larger, bolder type at the  
 16 very beginning of the Enrollment Agreement - that sweepingly applies to “[a]ny questions or  
 17 problems concerning this school.” (*Id.*, page 1.) Samuel’s claims in this lawsuit do not arise out  
 18 of his *enrollment* at Ex’pression, but arise instead out of his *expulsion* from Ex’pression.<sup>6</sup> In view  
 19 of the breadth of the general dispute resolution procedure and the narrowness of the arbitration  
 20 procedure, it can hardly be said that the parties have “clearly and unmistakably” provided that  
 21 Samuel’s claims are subject to the arbitration provision. Accordingly, the scope of the arbitration  
 22 provision must be determined by this Court. *Howsam v. Dean Witter, supra*, 537 U.S. at 83.

23 Likewise, whether the arbitration provision is procedurally and substantively

25 <sup>5</sup> As explained in *Nagrampa* and *Geoffroy*, if Samuel had disputed the validity of the entire Enrollment Agreement  
 26 rather than simply the arbitration provision, the arbitrator might arguably have a broader role in determining  
 arbitrability. (*Ibid.*) But Samuel does not dispute the validity of the entire Enrollment Agreement. He simply  
 contends that the arbitration provision does not compel him to arbitrate the causes of action asserted in this lawsuit.

27 <sup>6</sup> The term “enrollment” means to the act of enrolling or registering for a class or school. *Webster’s Dictionary* (1913),  
 28 at <http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=enrollment>, and *Encarta® World English Dictionary*  
 (N. Am. Ed.) at <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861608579>.

1 unconscionable are issues that must be determined by this Court. The law has been too long and  
 2 too well settled for Ex'pression to pretend otherwise. *Nagrampa, supra*, 469 F.3d at 1264;  
 3 *Geoffroy, supra*, 484 F.Supp.2d at 1118.

4 **B. Samuel's Claims Do Not Come Within The Scope Of The Arbitration Provision.**

5 As we have just shown, the Enrollment Agreement refers to two different dispute  
 6 resolution procedures: (1) the introductory section of the agreement prominently and broadly  
 7 refers to "a complaint and grievance procedure" for resolving "[a]ny questions or problems  
 8 concerning this school which have not been satisfactorily resolved by the school"; and (2) section  
 9 6.1 of the agreement states more narrowly and inconspicuously that disputes about "enrollment"  
 10 are subject to the AAA's Commercial Rules. (Attachment A, pages 1–2.) The causes of action  
 11 set forth in Samuel's complaint allege that his legal rights were violated by the manner in which  
 12 Ex'pression *expelled* him. Those causes of action are not based on claims that his legal rights  
 13 were violated by the manner in which Ex'pression enrolled him. Samuel did not agree to arbitrate  
 14 those causes of action.

15 That conclusion is strongly supported by a recent California case, *Thompson v. Toll*  
 16 *Dublin, LLC*, First District Court of Appeal, August 13, 2008, 2008 D.A.R. 12,724  
 17 ("*Thompson*"), a copy of which is set forth in Attachment B hereto. In *Thompson*, as in this case,

18 the court was called upon to determine whether certain claims came within the scope of an  
 19 arbitration provision. The court stated that the arbitration provision at issue should not be  
 20 considered in isolation, but should instead be interpreted in the context of the contract as a whole.  
 21 *Id.*, 2008 D.A.R. at 12,725. In language fully applicable here, the court then stated:

22       The strong policy in favor of arbitration may not be used to permit a  
 23 party to enforce provisions of an arbitration agreement that, as here,  
 24 either do not exist or were so poorly drafted that another party  
 cannot be presumed to have agreed to them.

25 *Id.*, 2008 D.A.R. at 12,746.

26 For these reasons, this Court should hold that the claims alleged in Samuel's complaint  
 27 fall outside the scope of the arbitration provision.

1      **C. The Arbitration Provision Is Unconscionable And Thus Should Not Be Enforced.**

2            It is well settled that “unconscionability is a generally applicable contract defense, which  
 3 may render an arbitration provision unenforceable.” *Nagrampa, supra*, 469 F.3d at 1280; see  
 4 *Geoffroy, supra*, 484 F.Supp.2d at 1118. It is equally well settled that unconscionability issues  
 5 are to be decided under state contract law. *Ibid.* The arbitration provision at issue here is part of  
 6 a California contract, so California contract law governs.

7            In assessing procedural and substantive unconscionability, the California courts apply a  
 8 sliding scale, not unlike the sliding scale courts apply in deciding whether to issue a preliminary  
 9 injunction. The more procedurally unconscionable a contract is found to be, the less evidence of  
 10 substantive unconscionability is required, and vice versa. *Gentry v. Superior Court*, 42 Cal.4<sup>th</sup>  
 11 443, 468–469 (2007) [citing *Armendariz v. Foundation Psychcare Services, Inc.*, 24 Cal.4<sup>th</sup> 83,  
 12 114 (2000)]; *Thompson, supra*, 2008 D.A.R. at 12,746; see *Nagrampa, supra*, 469 F.3d at 1280.

13           Well before Ex’pression moved to compel arbitration, counsel for Samuel placed counsel  
 14 for Ex’pression on notice of his position that the arbitration provision at issue here is procedurally  
 15 and substantively unconscionable. (Clarke Dec., Exhibit B at page 2.) We are thus surprised to  
 16 see that Ex’pression’s motion completely ignores those issues. We demonstrate below that the  
 17 arbitration provision at issue here is unconscionable both procedurally and substantively.

18      **1. The Enrollment Procedure That Resulted In The Arbitration Provision Was**  
**Procedurally Unconscionable.**

19           The twin hallmarks of procedural unconscionability are oppression and surprise. *Gentry,*  
*supra*, 42 Cal.4<sup>th</sup> at 468 – 469. Both are present here.

20           Under California contract law, the analysis of oppression “begins with an inquiry into  
 21 whether the contract is one of adhesion. *Armendariz, supra*, 24 Cal.4<sup>th</sup> at 113; *Thompson, supra*,  
 22 2008 D.A.R. at 12,746. The Enrollment Agreement is a classic contract of adhesion – a  
 23 standardized, pre-printed form, drafted by the party of superior bargaining power, and presented  
 24 to Samuel without any opportunity for negotiation. See *Armendariz, supra*, 24 Cal.4<sup>th</sup> at 113;  
 25 *Thompson, supra*, 2008 D.A.R. at 12,746; *Ting v. AT&T*, 319 F.3d 1126, 1148 (9<sup>th</sup> Cir. 2003). If  
 26 he wanted to enroll at Ex’pression, he needed to sign and return Ex’pression’s enrollment form.  
 27  
 28

Moreover, the manner in which the arbitration provision at issue here was imposed on Samuel is permeated with surprise. He was a person with mental disabilities and at the time he was called upon to sign the Enrollment Agreement had no education beyond high school. He received no advance warning that the Enrollment Agreement he was required to sign contained an arbitration provision. The fact that a *different* dispute resolution procedure is more prominently displayed in the introduction to the Enrollment Agreement obscured the presence and effect of the arbitration provision. There was no discussion of that provision or arbitration during the enrollment process. He was given little time to consider that provision. Ex'pression did not provide him with a copy of the AAA Commercial Rules to which that provision refers before he was called upon to initial the arbitration provision and sign the Enrollment Agreement. (Indeed, *to this very day*, Ex'pression has failed to inform Samuel or this Court as to which version of the AAA Commercial Rules Ex'pression seeks to apply in this case.) Nor did Ex'pression provide him with any information concerning the differences between court and arbitration expenses, or the differences between the remedies available to him in court and the much more limited remedies available to him under the AAA Commercial Rules. As a result, Samuel was not made aware that agreeing to arbitration pursuant to those rules entailed not only a waiver of his right to trial by a jury, but also entailed an obligation to pay larger costs and a waiver of various other rights – including his right to recover such costs in the event that he prevails.

For these reasons, this Court should determine that the arbitration provision is the product of a high degree of procedural unconscionability. See *Armendariz, supra*, 24 Cal.4<sup>th</sup> at 113 - 114; *Thompson, supra*, 2008 D.A.R. at 12,746 – 12,747; *Nagrampa, supra*, 469 F.3d at 1280–1293.

## 2. The Arbitration Provision Is Substantively Unconscionable.

A contract is substantively unconscionable if it is overly harsh or generates one-sided results. See *Geoffroy, supra*, 484 F.Supp.2d at 1118-1119. A contract is also substantively unconscionable if it limits statutorily imposed remedies. *Armendariz, supra*, 24 Cal.4<sup>th</sup> at 103; see also *Nagrampa, supra*, 469 F.3d at 1292 (“California courts refuse to enforce arbitration provisions on public policy grounds if they impede the enforcement of nonwaivable statutory rights.”) Moreover, an arbitration provision is substantively unconscionable if it is so

1 unforeseeably broad that it is not within the reasonable expectations of the plaintiff. *Thompson*,  
 2 *supra*, 2008 D.A.R. at 12,747. The arbitration provision at issue here fails on all three counts.

3 As we have demonstrated above, the effect of enforcing the arbitration provision would be  
 4 to require student claimants, such as Samuel in this case, to pay much larger filing fees than they  
 5 would have to pay in court; would require student claimants to pay substantial case management  
 6 fees they would not have to pay in court; and would require student claimants to pay some part of  
 7 the arbitrator's fees. In view of the fact that the *minimum* Initial Filing Fee under the AAA's  
 8 Commercial Rules is \$750, Ex'pression's arbitration provision effectively bars its students from  
 9 obtaining any relief if they do not have \$750 in their pocket. To obtain a hearing under the  
 10 AAA's Commercial Rules, student claimants would have to pay an additional Case Service Fee  
 11 of *at least* \$200, and would apparently have to pay half the arbitrator's fees. See C.C.P. § 1284.2  
 12 (unless arbitration agreement otherwise provides, parties pay pro rata shares of all arbitrator fees  
 13 and expenses). Whether a student claimant might recoup any of those expenses would be entirely  
 14 within the discretion of the arbitrator, *even if the student claimant were the prevailing party*.  
 15 (AAA Commercial Rules 43(b) and (c), 49, 51 and Fee schedule [Clarke Dec., Exhibit A].)  
 16 Obviously, arbitration under the AAA's Commercial Rules imposes financial burdens that  
 17 Ex'pression is much more capable of bearing than student claimants such as Samuel would be.<sup>7</sup>

18 That the arbitration scheme chosen by Ex'pression is overly harsh and one-sided is further  
 19 demonstrated by the fact that, even within the confines of available AAA arbitration procedures,  
 20 Ex'pression deliberately selected the *Commercial* Rules – rules designed for the resolution of  
 21 disputes concerning private business transactions - instead of AAA rules that are much less  
 22 expensive and onerous for claimants. (See, e.g., AAA Consumer Rules and Employment Rules,  
 23 at [www.adr.org](http://www.adr.org).) Indeed, it would seem that by selecting the AAA's Commercial Rules  
 24 Ex'pression went out of its way to erect a financial barrier to student claims.

25 The courts refuse to enforce arbitration agreements where the potential costs of arbitration  
 26

27  
 28 <sup>7</sup> Samuel's father is employed as a paralegal by the firm that represents Samuel in this lawsuit. The firm is  
 representing his son in this case on a pro bono basis. (Clarke Dec., ¶ 4.)

1 are large enough to deter the plaintiff and other similarly situated individuals from vindicating  
 2 their statutory rights in the arbitral forum. *Armendariz, supra*, 24 Cal.4<sup>th</sup> at 103; *Morrison v.*  
 3 *Shankle*, 317 F.3d 646, 657–665; see also *Nagrampa, supra*, 469 F.3d at 1292–1293 [citing  
 4 *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal.4<sup>th</sup> 495, 506–506 (2005)]. In this  
 5 case, the arbitration provision at issue not merely *impedes* the vindication of statutory rights, but  
 6 prevents student claimants from achieving such vindication. This is well illustrated by Samuel's  
 7 claims. If he prevails in court, he would be entitled to attorneys fees, penalties and costs. See,  
 8 e.g., 29 U.S.C. § 794, C.C.P. §§ 51 and 52(a), and F.R.Civ.P 54(d). Under the AAA's  
 9 Commercial Rules, however, an arbitrator is completely free to deny such relief to prevailing  
 10 student claimants.

11 Finally, in view of the striking contrast between the broad dispute resolution procedure  
 12 prominently displayed at the beginning of the Enrollment Agreement and the narrow arbitration  
 13 provision inconspicuously set forth on the second page of that agreement, “the purported scope of  
 14 the arbitration provision[] exceeded [Samuel's] reasonable expectations. *Thompson, supra*, 2008  
 15 D.A.R. at 12,747.

16 For these reasons, this Court should determine that the arbitration provision exhibits a  
 17 high degree of substantive unconscionability.<sup>8</sup>

18 **D. In The Event That Ex'pression Disputes The Facts Presented In This Opposition,**  
 19 **Any Genuine Issue Of Material Fact Should Be Tried By Jury.**

20 As stated above, Ex'pression has chosen to ignore the issues of procedural and substantive  
 21 unconscionability - even though counsel for Ex'pression has been put on notice of the existence  
 22 of both those issues. (Clarke Dec., Exhibit B.) We anticipate that Ex'pression's reply papers  
 23 may now attempt to dispute some of the facts presented here.

24 If this Court concludes that there are genuine issues of material fact with regard to

---

25  
 26  
 27 <sup>8</sup> When courts find contracts to be unconscionable, it is sometimes argued that the contract can be saved by severing  
 28 the offending portion. See, e.g., *Armendariz, supra*, 24 Cal.4<sup>th</sup> at 1121–1127. Ex'pression's arbitration scheme  
 cannot be saved by severance. As we have demonstrated, as applied to student claimants the offending provisions of  
 the AAA's Commercial Rules are so numerous that severing them would make that arbitration procedure inoperable.  
 RC1/5169117.1/CB12

1 Ex'pression's motion to compel arbitration, such issues should be resolved by jury trial. See  
 2 *Geoffroy, supra*, 484 F.Supp.2d at 1119.<sup>9</sup>

3 **E. In The Event That The Motion To Compel Is Granted, This Lawsuit Should Be**  
 4 **Stayed Rather Than Dismissed.**

5 Ex'pression contends that, in the event its motion to compel arbitration is granted, this  
 6 lawsuit should be dismissed. (Def. Mem., 8:12–8:20.) Accordingly, Ex'pression has moved to  
 7 dismiss Samuel's complaint pursuant to F.R.Civ.P. 12(b) and (6). Those motions to dismiss  
 8 should be denied.

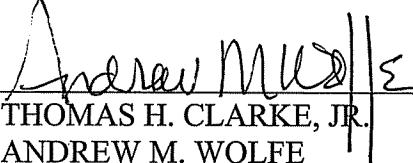
9 The correct course of action in the event that the motion to compel arbitration were to be  
 10 granted is the one explicitly prescribed by statute: to stay the action "until such arbitration has  
 11 been had in accordance with the terms of the agreement, providing that the applicant for the stay  
 12 is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

13  
 14 **IV. CONCLUSION**

15 For the foregoing reasons, Ex'pression's motions to compel arbitration and to dismiss the  
 16 complaint should both be denied.

17 Dated: August 18, 2008

18 ROPERS, MAJESKI, KOHN & BENTLEY

19 By: 

20 THOMAS H. CLARKE, JR.  
 21 ANDREW M. WOLFE  
 22 TIMOTHY A. DOLAN  
 23 Attorneys for Plaintiff  
 24 SAMUEL DIGIACOMO

25  
 26  
 27  
 28 <sup>9</sup> With this opposition, Samuel is submitting a demand for trial by jury as to such issues.

# Exhibit A

---

# enrollment AGREEMENT



Ex'pression College  
for Digital Arts  
6601 Shellmound Street  
Emeryville, CA 94608

This agreement is made on the 18 day of September, 2006 by and between EX'PRESSION COLLEGE FOR DIGITAL ARTS, herein referred to as ECDA and SIMUEL VIGLIOCCHIO, herein referred to as the STUDENT.

Student Address: 4739 LOUISE LANE

STREET ADDRESS/PO BOX

CA APT. #

44507

UNION CITY

CITY

STATE

ZIP

Student Phone Number: (510) 487-1721

**This enrollment agreement, when signed by the student and accepted by the school is a legally binding agreement.**

Ex'pression College for Digital Arts is located at 6601 Shellmound Street, Emeryville, CA 94608. All instruction is provided at this address.

**Any questions or problems concerning this school which have not been satisfactorily answered or resolved by the school should be directed to the Bureau of Private Postsecondary and Vocational Education, 1625 North Market Blvd., Suite S202, Sacramento, CA 95834.**

Student's Initials: SD I have been given a copy of the complaint and grievance procedure.

**1. ENROLLMENT INFORMATION:**

1.1 The student is enrolling in the program marked below, which is \_\_\_\_\_ academic months. Four Academic Years are required for completion of a Bachelor of Applied Science Degree.

**Bachelor of Applied Science in Motion Graphic Design**  
(4 Academic Years)

ECDA's Motion Graphic Design Program develops students' knowledge and skills through an intensive series of visual design, animation, interactive and motion graphics theory courses. A total of \_\_\_\_\_ Semester Credit Units are required to complete the program.

**Bachelor of Applied Science in Animation and Visual Effects**  
(4 Academic Years)

ECDA's Animation and Visual Effects Program is designed to enhance the student's knowledge and skills through an intensive series of courses including 3D modeling and animation, texture and lighting, compositing, digital film and video effects, graphics for the Internet and more. A total of 124 Semester Credit Units are required to complete the program.

**Bachelor of Applied Science in Sound Arts** (4 Academic Years)

ECDA's Sound Arts Program offers students the opportunity to take part in numerous recording sessions, to experience mixing for CD release, to lock audio for picture, to learn surround sound, to learn DVD authoring, and many other technologies. Students explore first-hand numerous live sound and lighting applications, acoustical design, developing an understanding of the psychology of the studio, and much more. A total of \_\_\_\_\_ Semester Credit Units are required to complete the program.

1.2 Please see the College catalog for detailed program descriptions.

Student Initials: SD I have received a College catalog.

1.3 The starting date for the program of enrollment is 9/12/06.

**2. CLASS TIMES**

2.1 Although most classes occur between the hours of 8:00 am and 6:00 pm, ECDA is a 24-7 facility; labs and lectures may be scheduled accordingly.

**3. GRADUATION REQUIREMENTS AND DOCUMENTS AWARDED**

3.1 To receive a degree from ECDA, a student must complete the following:  
1) Must have achieved a minimum cumulative academic grade of 71%  
2) Must have a minimum 85% attendance for class  
3) Must have successfully completed all applicable courses

- 4) Must have fulfilled all financial responsibilities with regard to ECDA and be in good standing
- 5) Must complete an exit interview with the career development department
- 6) Must complete the last 25% of his/her education on the main campus at ECDA.

3.2 When the student has completed all graduation requirements, the institution will award a Bachelor of Applied Science Degree.

**4. TERMS AND CONDITIONS**

4.1 Eligible reasons for delaying a start after a student has already enrolled are:

- 1) Family death or serious illness
- 2) Uncontrolled events, natural disasters or
- 3) Military service. If a student must delay his/her start, he/she must notify the Admissions Department in writing at least 10 days prior to the scheduled start date. The start must be rescheduled within six months.

4.2 ECDA reserves the right to make adjustments in the official calendar of start dates. Such alterations will be officially announced no later than 3 months before the change occurs except when a change must be made due to an unforeseen event or a natural disaster. Because ECDA's refund policy is based on the time that classes have been in session, such changes will have no impact on the refund policy and its impact on students.

4.3 ECDA reserves the right to make changes in programs, materials, schedules, faculty and staff when such changes are in the best interest of the student and/or the institution. Changes in programs and schedules may alter a student's expected graduation date. Students will be responsible for fulfilling graduation requirements in effect when a student has enrolled, re-enrolled, after withdrawing, or been reinstated after a dismissal. Additional tuition may be required for coursework that is required because of such an enrollment change.

4.4 ECDA reserves the right to terminate this agreement in the event of:

- 1) violation of the standards of conduct
- 2) destruction of property by the student
- 3) non-payment of tuition & fees
- 4) unsatisfactory academic progress
- 5) poor attendance

4.5 The student's dissatisfaction with or non-receipt of educational services offered by ECDA does not excuse the student from repayment of any private loan, state loan or grant, federal loan, SLS, or other loan whatsoever made to the student for enrollment and completion of training at ECDA.

4.6 ECDA offers occupational training, not employment. ECDA provides placement assistance, but makes no guarantee of job placement or employment.

Student Initials: SD I have received a copy of the school's Performance Fact Sheet, which details completion and placement statistics.

**5. BUYER'S RIGHT TO CANCEL**

5.1 The student may terminate this agreement by giving written notice by midnight of the fifth business day following the date of this agreement to the Office of the VP of Admissions, Ex'pression College for Digital Arts, 6601 Shellmound Street, Emeryville, CA 94608.

5.2 Students who have not visited the school prior to enrollment will have the opportunity to withdraw without penalty within five business days following either the regularly scheduled orientation or following a tour of the school facilities and inspection of equipment where training and services are provided.

Student Initials: SD I have had a tour of the school.

## 6. ARBITRATION AGREEMENT

6.1 Any dispute arising from enrollment at Ex'pression College for Digital Arts, no matter how described, pleaded or styled, shall be resolved by binding arbitration under the Federal Arbitration Act conducted by the American Arbitration Association ("AAA") at Emeryville, California, under its Commercial Rules. All determinations as to the scope, enforceability of this Arbitration Agreement shall be determined by the Arbitrator, and not by a court. The award rendered by the arbitrator may be entered in any court having jurisdiction.

Student Initials: SJ have read and understand the Arbitration Agreement.

## 7. REFUND POLICY

### 7.1 Cancellation or Withdrawal Prior to Start of Instruction

The school will refund all charges less \$95 for the non-refundable application fee (\$10 for Veterans) if the enrollment agreement is cancelled prior to the first day of instruction or if a student withdraws within five days after orientation.

### 7.2 Withdrawal or Termination Prior to Completion of Enrollment Period

If a student wishes to withdraw from ECDA he/she must make notification in writing to the Office of the Registrar at 6601 Shellmound St. Emeryville, CA 94608. If the student withdraws he/she will receive a pro-rata refund if the student has completed 60% or less of the academic year for which the student was charged. If the student has completed more than 60% of the academic year for which the student was charged, the tuition is considered earned and the student will receive no refund. Refunds will be calculated on the basis of the last day of actual attendance. Refunds will be paid within 30 days following the date the student notifies the Office of the Registrar of withdrawal or if the student is terminated from school a refund will be paid within 30 days following the date the student was notified of termination. A non-refundable Administrative Fee of \$95 will be charged for all students who withdraw or are terminated prior to completion of the enrollment period. The method for calculating a pro-rata refund is:

Total tuition charged for the academic year / total number of clock hours for the academic year = per clock hour tuition.

Per clock hour tuition x number of clock hours incurred  
= total tuition owed by student.

Total tuition owed by student + administrative fee  
= total owed by student.

Total tuition paid for academic year - total owed by student  
= refund amount.

The above policy complies with State of California requirements.

### 7.3 Return of Federal Funds

Refunds are allocated to financial sources in accordance with Federal Department of Education regulations. Regulations require refunds for students who receive Federal grants and/or loans and withdrew during their period of enrollment to be returned to the Federal Government.

Additional information on return of Federal Funds is available through the Financial Aid Office.

## 8. STUDENT TUITION RECOVERY FUND

8.1 As of January 1, 2002, California Education Code Section 94945 requires all colleges in the State of California licensed by the Bureau of Private Postsecondary and Vocational Education (BPPVE) to collect a fee from every new student to be remitted to the California Student Tuition Recovery Fund (STRF). This fund is administered by the State of California's BPPVE. The STRF assessment rate for enrollment agreements signed on or after January 1, 2003 is \$2.50 per \$1000 of tuition charged (rounded to the nearest 1,000). Based on ECDA's tuition of \$ 16,450, your STRF fee is \$ 41.00. Non-Californian residents or recipients of third party payor tuition are not eligible for protection under and recovery from the Student Tuition Recovery Fund and are not required to pay the STRF fee. The STRF fee is due on the start date, unless the State of California has determined that no assessment shall be levied pursuant to California Education Code Section 94945.

## 9. TUITION, FEES, METHOD AND TERMS OF PAYMENT

### 9.1 Tuition & Fees

- Tuition for academic year 16,450 for the program of enrollment is \$ 16,450.
- Application Fee of \$95 or \$10 for Veterans (For new students only, to be submitted with Application for Admission. This is a non-refundable fee)
- Returned Check Fee of \$50 (Charged for all checks returned for non-sufficient funds. The student is responsible for all late payment fees and collection costs for past due balances and will pay bank fees and charges for returned checks.)

• Late fee of \$50 (Will be charged if a payment is five or more days late. This is a non-refundable fee.)

• Installment Fee of \$25 per installment (if the student chooses payment Option 3. This is a non-refundable fee.)

Tuition includes all materials, books (General Education books are the property of ECDA and must be returned), and equipment required for the entire program such as: associated course books, art supplies, and relevant materials. Charges for repeated courses are not included in the above and are calculated at the per credit unit rate effective at the time of re-take. The tuition and other charges noted above are solely for one academic year. In order to complete the program of enrollment, it is necessary that the student pay tuition for every remaining academic year required to complete the program. (Four academic years are required for completion of a Bachelor of Applied Science Degree.)

9.2 The school reserves the right to change tuition rates. The tuition rates quoted in this enrollment agreement will remain in effect only for one academic year. Tuition for each succeeding academic year will be charged at the published tuition rate for that year. Changes in tuition will be announced five (5) weeks before they become effective. If a student withdraws and reenters or is reinstated after a dismissal he/she may also be subject to new tuition rates. Students who have prepaid tuition for the entire program will have no change in tuition unless they withdraw and reenter or are reinstated after a dismissal.

9.3 The student will meet with the Financial Aid Office before the beginning of each academic year and review payment options and student loan information. Payment amounts and due dates are based on the payment option chosen by the student. If the student elects a payment plan, it will be in compliance with the Federal Truth in Lending retail installment requirements and will become part of this enrollment agreement.

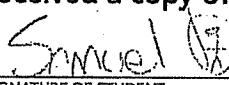
9.4 All payments must be in US dollars and made by check, money order, or cash to Ex'pression College for Digital Arts and are due in accordance with the payment option chosen.

## 10. NOTICE CONCERNING TRANSFERABILITY OF UNITS AND DEGREES EARNED AT OUR SCHOOL

Units you earn in our degree program in most cases will probably not be transferable to any other college or university. For example if you entered our school as a freshman, you will still be a freshman if you enter another college or university at some time in the future even though you earned units here at our school. In addition, if you earn a degree, diploma, or certificate in our degree program, in most cases it will probably not serve as a basis for obtaining a higher level degree at another college or university.

Student Initials: AD I have read and understand the Notice Concerning Transferability of Units and Degrees Earned at Ex'pression.

My signature below certifies that I have read, understood, and agreed to my rights and responsibilities, and that the institution's cancellation and refund policies and arbitration clause have been clearly explained to me. I have received a copy of this agreement.

 SIGNATURE OF STUDENT DATE SIGNATURE OF PARENT OR GUARDIAN DATE

 SIGNATURE OF SCHOOL OFFICIAL DATE OF ACCEPTANCE

# Exhibit B

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 2 Andrew M. Wolfe (SBN 114076)  
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 Telephone: 415.543.4800  
 Facsimile: 415.972.6301  
 E-Mail: [tolarke@rmkb.com](mailto:tolarke@rmkb.com);  
 awolfe@rmkb.com

6 Attorneys for Plaintiff  
 Samuel DiGiacomo

8 Eric J. Sinrod (SBN 122868)  
 Michael J. Dickman (SBN 227096)  
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13 Attorneys for Defendant  
 Ex'pression Center For New Media

15 **IN THE UNITED STATES DISTRICT COURT**

16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

17 SAMUEL DIGIACOMO,

Case No.: C08-01768-MHP

18 Plaintiff,

19 **JOINT CASE MANAGEMENT  
STATEMENT**

20 [FRCP 16, 26; Civ. L-R 16-10]

21 EX'PRESSION CENTER FOR NEW MEDIA,  
 INC., d/b/a EX'PRESSION COLLEGE FOR  
 22 DIGITAL ARTS, et al.,

Judge: Hon. Marilyn H. Patel  
 Date: August 18, 2008  
 Time: 4:00 P.M.

23 Defendants.

24 Complaint Filed: April 2, 2008

25 Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure and Civil Local Rule 16-9,  
 26 and in accordance with the Court's Standing Order Re Case Management Conference, Plaintiff  
 27 Samuel DiGiacomo ("Plaintiff") and Defendant Ex'pression Center for New Media d/b/a

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1 Ex'pression College for Digital Arts ("Defendant" or "Ex'pression") hereby submit this Joint  
 2 Case Management Statement in advance of the Initial Case Management Conference scheduled  
 3 on August 18, 2008.

4 **I. DISPUTE CONCERNING ARBITRABILITY**

5 This lawsuit involves a dispute between a former student and a private vocational school.  
 6 Plaintiff is a former student of Defendant Ex'pression Center for New Media, a private post-  
 7 secondary vocational school located in Emeryville, California that specializes in digital sound and  
 8 visual arts. Plaintiff alleges that during his entire life he has suffered from Asperger's Syndrome  
 9 and that this syndrome is a form of autism.<sup>1</sup> Plaintiff was enrolled in one of Ex'pression's  
 10 educational programs from approximately September 2006 until April 2007 when Plaintiff's  
 11 enrollment was terminated. Prior to termination he had successfully completed three semesters of  
 12 study. Plaintiff filed this action alleging violations of both federal and state law arising out of his  
 13 termination from Defendant's educational program. The parties dispute the factual basis and/or  
 14 reasons for Plaintiff's termination from the program.

15 Plaintiff contends that the termination decision was based on the false and perjured  
 16 statements of former roommates who, unfortunately, were drug abusers, and that any other  
 17 conduct that Defendant cites is merely puffery created after the lawsuit was filed. Plaintiff  
 18 contends that his evidence will show: (1) that both of the complainants against him were former  
 19 roommates who had been terminated from their tenancy because of their drug addiction and  
 20 drug-related misconduct; and (2) that one of those complainants was arrested by Emeryville  
 21 Police when, following his eviction, he tried to break into the apartment he formerly shared with  
 22 Plaintiff.

23 Ex'pression disputes Plaintiff's version of the facts, and Defendant contends that Plaintiff's  
 24 termination was justified under the circumstances in that Plaintiff's behavior was disruptive to the  
 25 educational process and threatening to faculty and other students. Defendant denies that any of

---

26  
 27 <sup>1</sup> Plaintiff also contends that he suffers from bipolar disorder (also known as manic depression); that this condition,  
 28 like his Asperger's Syndrome, was made known to Defendant at the time of his enrollment; and that at the time of his  
 enrollment, his mother offered the school copies of medical records showing his diagnosis with these two disorders.  
 Plaintiff will add allegations regarding this disorder to the complaint when it is next amended.

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1 its conduct was unlawful in any way.

2 Ex'pression asserts this case is subject to mandatory arbitration under the Federal  
 3 Arbitration Act. As part of his enrollment into Defendant's educational program, Plaintiff  
 4 executed an Enrollment Agreement which contains an arbitration clause. As a result, Defendant  
 5 contends that Plaintiff's claims must be referred to binding arbitration under the Federal  
 6 Arbitration Act. Plaintiff, however, contends that the arbitration clause contained in the  
 7 Enrollment Agreement is unenforceable because, inter alia, it is procedurally and substantively  
 8 unconscionable and, as result, his claims may proceed in this Court.

9 In early June 2008, Defendant's counsel advised Plaintiff's counsel that this matter was  
 10 subject to the arbitration clause. Plaintiff's counsel responded that this matter should not be  
 11 referred to arbitration because that clause was invalid as a matter of law. This motion has been  
 12 scheduled as follows:

13 August 18, 2008 -- Plaintiff's Opposition Due

14 August 25, 2008 -- Defendant's Reply Due

15 September 8, 2008 -- Hearing on Motion to Compel Arbitration

16 For the sake of judicial economy and to avoid potentially unnecessary time, effort and  
 17 expenses, the parties agree that this case should be stayed until such time as this Court enters an  
 18 order on Defendant's motion to compel arbitration.

## 19 II. DISCUSSION OF CASE MANAGEMENT SUBJECTS

20 In light of the arbitration dispute discussed above, the parties believe that it is premature  
 21 to address most of the subjects required in a Joint Case Management Statement pursuant to this  
 22 Court's standing order. Those subjects which address case management, discovery, and  
 23 scheduling would become moot in the event the Court grants the Motion to Compel Arbitration.  
 24 Nonetheless, the parties have attempted to address those subjects in good faith, which are  
 25 discussed below.

### 26 1. Jurisdiction and Service.

27 Plaintiff's complaint asserts that this Court has subject matter jurisdiction in this matter  
 28 pursuant to 28 U.S.C. sections 1331, in that this case arises out of alleged violations of the

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1 Rehabilitation Act of 1973, codified at 29 U.S.C. section 701, *et seq.*, and seeks declaratory relief  
2 pursuant to 28 U.S.C. section 2201. Plaintiff further asserts this Court has supplemental  
3 jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. section 1337(a) in that such  
4 state law claims arise out of the same case or controversy under Article III of the United States  
5 Constitution. As discussed above, Defendant contends this action is subject to mandatory  
6 arbitration under the Federal Arbitration Act.

7 Defendant's counsel agreed to accept service of the complaint, and Plaintiff served his  
8 complaint on counsel for Defendant on May 27, 2008. On May 29, 2008, Defendant's counsel  
9 returned an executed copy of Waiver of Service of Summons to Plaintiff's counsel. The parties  
10 have agreed that Expression need not respond to the complaint until after the Court decides  
11 Expression's motion to compel arbitration.

12 **2. Brief Statement of Facts.**

13 The parties' factual contentions are set forth in Section I above.

14 **3. Legal Issues.**

15 Plaintiff contends that Defendant violated both federal and state law in connection with  
16 Plaintiff's termination from Defendant's educational program. To that end, Plaintiff alleges six  
17 causes of action against Defendant for alleged violations of the Rehabilitation Act of 1973 under  
18 29 U.S.C. section 701, *et seq.*, alleged discrimination in violation of California Government Code  
19 sections 11135 and 11139, alleged violations of the Unruh Civil Rights Act under California Civil  
20 Code section 51, alleged violations of the California Unfair Competition Law under California  
21 Business and Professions Code section 17200, alleged violations of a common law right to fair  
22 procedure under California law, and seeks declaratory relief under 28 U.S.C. section 2201 and  
23 California Code of Civil Procedure section 1060. Defendant denies that its conduct was unlawful  
24 in any manner, or that Plaintiff is entitled to relief of any kind. Further, Defendant contends this  
25 matter is subject to mandatory binding arbitration under the Federal Arbitration Act.

26 **4. Motions.**

27 As mentioned above, Plaintiff and Defendant dispute whether this case is subject to  
28 mandatory arbitration under the Federal Arbitration Act. As a result, the parties believe it is

1 premature to address the nature and scope of any anticipated motions beyond Defendant's motion  
2 to compel arbitration.

3 **5. Amendment of Pleadings.**

4 At present, Plaintiff does not anticipate amending his complaint. Defendant has not yet  
5 responded to the complaint, and the parties have agreed that Defendant need not respond until  
6 after the Court decides Defendant's motion to compel arbitration. In the event the Court denies  
7 Defendant's motion to compel arbitration, the parties agreed during the meet and confer process  
8 that Defendant would file its responsive pleading no later than 30 days after entry of the Court's  
9 order denying the motion.

10 **6. Evidence Preservation.**

11 Counsel for both parties have informed their respective clients of the necessity of  
12 preserving all potentially relevant documentation and electronic information, and requested that  
13 all such documentation and/or information be preserved.

14 **7. Initial Disclosures.**

15 During the meet and confer process regarding the arbitration issue, the parties agreed to  
16 postpone the time for service of Initial Disclosures pursuant to Rule 26 of the FRCP. The parties  
17 agree that in the event the Court denies the motion to compel arbitration, initial disclosures shall  
18 be due 30 days after entry of the Court's order denying the motion. If the motion to compel  
19 arbitration is granted, the parties' Initial Disclosure obligations would be moot.

20 **8. Discovery.**

21 As discussed above, the parties agree this case should be stayed pending a determination  
22 of Defendant's motion to compel arbitration. If the motion to compel arbitration is granted, the  
23 parties' discovery obligations would be moot. In the event the Court denies the motion to compel  
24 arbitration, the parties will promptly meet and confer regarding a mutually agreeable discovery  
25 plan for this case.

26 **9. Class Actions.**

27 This case is not a class action. However, Plaintiff has informed Defendant that if the  
28 motion to compel arbitration is denied, Plaintiff may amend its complaint to state a class action.

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1 In Plaintiff's view, if, as it now appears, Defendant has in fact inserted the same arbitration clause  
2 in the enrollment forms it has required a large number (if not all) of its students to sign as a  
3 precondition to becoming one of its students, the legality of Defendant's conduct may most  
4 appropriately be determined on a class-wide basis. Defendant disagrees, and would oppose class  
5 treatment in this case.

6 **10. Related Cases.**

7 There are no cases related to this action.

8 **11. Relief.**

9 In light of the arbitration issue, the parties believe it is premature to address the relief  
10 sought in the complaint.

11 **12. Settlement and ADR.**

12 To date, the parties have engaged in informal settlement discussions but have been unable  
13 to resolve the case. During the meet and confer process on June 23, 2008, Plaintiff's counsel  
14 indicated a willingness to mediate this dispute. Defendant contends that this matter is subject to  
15 binding arbitration as discussed above.

16 **13. Consent to Magistrate**

17 On or about June 26, 2008, Plaintiff objected to the assignment of a Magistrate Judge ,  
18 which resulted in this matter being reassigned to this Court.

19 **14. Other References.**

20 Defendant contends that this matter is subject to arbitration as set forth above. Beyond the  
21 arbitration issue, the parties do not believe it would necessary to refer this case to a special master  
22 or the Judicial Panel on Multidistrict Litigation.

23 **15. Narrowing of Issues.**

24 At present, the parties believe it is premature to attempt to narrow the issues in this case in  
25 light of the arbitration dispute.

26 **16. Expedited Schedule.**

27 At present, the parties do not believe this case should be subject to an expedited schedule,  
28 but should be governed by the applicable Federal Rules of Civil Procedure.

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1           **17. Scheduling.**

2           If the Court grants Defendant's motion to compel arbitration, the parties agree that  
3 scheduling issues would be moot. However, in the event the Court denies the motion, the parties  
4 agree to meet and confer promptly in order to develop a mutually acceptable schedule for this  
5 case. During the meet and confer process, the parties agreed upon the following deadlines in the  
6 event the Court denies the motion:

7           Initial Disclosures under Rule 26 -- 30 days after entry of order denying motion.

8           Defendant's response to complaint -- 30 days after entry of order denying motion.

9           **18. Trial.**

10          In the event the Court denies Defendant's motion to compel arbitration, both parties  
11 request a trial by jury in this matter. The parties estimate that trial would last approximately two  
12 weeks.

13          **19. Disclosure of Interested Non-Parties.**

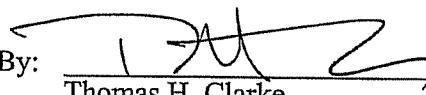
14          Pursuant to Civil Local Rule 3-16, the following persons and corporations have a financial  
15 interest in Ex'pression Center for New Media d/b/a Ex'pression College for Digital Arts: EJW,  
16 Inc., a wholly owned subsidiary of Ex'tent, b.v., a Dutch corporation. Ex'tent, b.v. is privately  
17 owned by Carolien Wintzen.

18          **20. Other Matters.**

19          None at this time.

20          Dated: August 8, 2008

21          Respectfully submitted,  
**ROPER MAJESKI KOHN & BENTLEY**

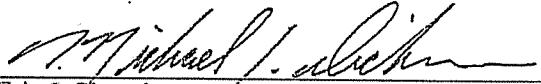
22          By: 

23          Thomas H. Clarke  
24          Attorneys for Plaintiff  
25          Samuel DiGiacomo

1 Dated: August 7, 2008

DUANE MORRIS LLP

2 By:

  
Eric J. Sinrod  
Michael J. Dickman  
Attorneys for Defendant  
Ex'pression Center For New Media

Ropers Majeski Kohn & Bentley  
A Professional Corporation  
San Francisco

# Exhibit C

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**ORDER**

Cite as 2008 DJDAR 12742

PETER V. THOMPSON et al.,  
 Plaintiffs and Respondents,  
 v.  
 TOLL DUBLIN, LLC, et al.,  
 Defendants and Appellants.

No. A116856  
 (Alameda County  
 Super. Ct. No. VG-06-291972)  
 California Court of Appeal  
 First Appellate District  
 Division Two  
 Filed August 13, 2008

**ORDER CERTIFYING OPINION  
FOR PUBLICATION****THE COURT:**

The opinion in the above-entitled matter filed on July 23, 2008 was not certified for publication in the Official Reports. For good cause, the request for publication by Respondents and interested parties is granted.

Pursuant to California Rules of Court, rules 8.1105 and 8.1120, the opinion in the above-entitled matter is ordered certified for publication in the Official Reports.

Dated: \_\_\_\_\_

Kline, P.J.

**CONTRACTS**

*Arbitration agreement is unenforceable against condominium buyers where provisions did not apply to fraud-related claims and were unconscionable.*

Cite as 2008 DJDAR 12742

PETER V. THOMPSON et al.,  
 Plaintiffs and Respondents,  
 v.  
 TOLL DUBLIN, LLC, et al.,  
 Defendants and Appellants.

No. A116856  
 (Alameda County  
 Super. Ct. No. VG-06-291972)  
 California Court of Appeal  
 First Appellate District  
 Division Two  
 Filed July 23, 2008

Defendants Toll Dublin, LLC (Toll Dublin), Toll Brothers Real Estate, Inc. (Toll Brothers), and James Whiteley Boyd (Boyd) (collectively, defendants) appeal the trial court's order denying their motion to compel arbitration after plaintiffs Peter V. Thompson, Deborah Thompson, Kim K. Thompson, Brooke Turner, Donna J. Covey, James Turner, Valerie Raymundo-Enrile, Efren D. Enrile, Jr., Alfred Toy, Jennie L. Toy, Sean Toy, Ai-Ling Chin, James C. Jung, Cynthia M. Lai, Joseph F. Castro, and Reno R. Arguello (collectively, plaintiffs) filed a lawsuit against defendants, raising various fraud-related claims arising from their purchase of condominiums built and/or sold by defendants.<sup>1</sup> Defendants claim that plaintiffs' lawsuit is precluded by an arbitration agreement previously entered into by both parties. Because we conclude (1) the arbitration agreement did not apply to plaintiffs' fraud-related claims, and (2) the arbitration provisions were, in any event, unconscionable and therefore unenforceable, we shall affirm the order.

**PROCEDURAL BACKGROUND**

On October 3, 2006, plaintiffs filed a complaint for damages for (1) rescission based on fraud against Toll Dublin; (2) breach of fiduciary duty against Toll Brothers and Boyd; (3) constructive fraud against Toll Brothers and Boyd; (4) fraud against Toll Brothers and Boyd; (5) failure to disclose against Toll Brothers and Boyd; (6) breach of duty to be honest and truthful against Toll Brothers and Boyd; (7) rescission based on mutual mistake of fact against Toll Dublin; (8) rescission based on unilateral mistake of fact against Toll Dublin; and (9) fraudulent acts or practices (Bus. & Prof. Code, § 17200) against Toll Dublin.

On November 20, 2006, defendants filed a petition to compel arbitration and stay proceedings.

On January 11, 2007, the trial court denied defendants' motion to compel arbitration and stay proceedings.

On February 15, 2007, defendants filed a notice of appeal.

**FACTUAL BACKGROUND**

During March and April 2005, plaintiffs entered into seven separate purchase agreements with Toll Dublin for the purchase of condominium units in Building 13 at the Villas in Dublin Ranch Villages. According to plaintiffs' complaint, during construction, Toll Dublin failed to take necessary precautions to keep the interior of Building 13 from becoming saturated with water; allowed mold to form and fester inside of Building 13; and had actual knowledge of the

<sup>1</sup> The complaint alleged that Toll Dublin "developed, planned, improved, designed, constructed, promoted, marketed, advertised and sold homes" in the Villas at Dublin Ranch Villages (the project), and that Toll Brothers and Boyd were estate agents and/or brokers involved in the sale of "units" at the project to plaintiffs.

wet, moldy, and unhealthful conditions, but hid and concealed these conditions from plaintiffs so that plaintiffs would close escrow on the problem homes. Plaintiffs' complaint also alleged that, shortly after plaintiffs closed escrow, in April and May 2006, "conditions inside Building 13 were so grave that [Toll Dublin] demanded that those plaintiffs that had actually moved in leave their new home and their belongings and relocate. Similarly, as to those plaintiffs that had not even moved into Building 13, [Toll Dublin] demanded that they not move in. [¶] Since June 2006 and continuing through the date of this Complaint, plaintiffs have been excluded from Building 13 while [Toll Dublin has] attempted to decontaminate Building 13." The complaint further alleged that Toll Brothers and Boyd also became aware of the wet and moldy conditions that existed within Building 13 in the months before the close of escrow, but failed to disclose the existence of these conditions to plaintiffs, and that plaintiffs were unaware of the existence of these conditions prior to the close of escrow.

## DISCUSSION

### I. Background

#### A. The Arbitration Provisions

In their purchase agreements, plaintiffs indicated, with their initials, that they had received copies of numerous additional documents—comprising some 800 pages—including, *inter alia*: a "Title 7 Addendum (Compliance with Civil Codes Sections 895, et seq.)" (Title 7 Addendum); a "Title 7 Master and Dispute Resolution Declaration (Compliance with Civil Code)" (Title 7 Master Declaration);<sup>2</sup> and a "Declaration of Covenants, Conditions and Restrictions of the Villas at Dublin Ranch Villages" (CC&Rs). A copy of Title 7 (Civ. Code, § 895 et seq.) was also included.

The Title 7 Addendum, a 10-page document, provided, *inter alia*, in its initial two paragraphs:

"1. TITLE 7—CIVIL CODE SECTIONS 895 ET SEQ.: The term 'Title 7' refers to Title 7, Part 2 of Division 2 of the California Civil Code, Sections 895–945.5. This Addendum and all of the documents attached to it exist for the purpose of implementing the requirements of Title 7. Title 7 does a variety of things. It establishes standards for the performance of the Property and allows Seller to impose additional standards on itself. . . . Title 7 also requires that Buyer be given a complete copy of Title 7 and certain written

notifications. . . . [¶] . . . [¶]"

"2. ATTACHED DOCUMENTS: Attached to this Addendum are the Master Declaration for Title 7 and Dispute Resolution (Title 7 Master Declaration) and the Individual Declaration and Notices for Title 7 and Dispute Resolution (Title 7 Individual Agreement). . . . These two (2) documents and their exhibits implement the requirements of Title 7 and contain all of the items referred to in Paragraph 1, above."

In addition to subsequent paragraphs related to such matters as an enhanced protection agreement, a fit and finish warranty, a maintenance manual, manufactured product information, and customer service information, it also provided information related to resolution of disputes, as follows:

**"10. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES:** The Formal Claim Process described in Paragraph 9, above, provides a process intended to resolve disputes without filing an action (litigation or arbitration). If the Formal Claim Process does not result in a resolution of a dispute, or if a dispute is not subject to the Formal Claim Process, the dispute shall be resolved through the alternative binding dispute resolution procedures set forth in Sections 5.3 and 5.4 of the Title 7 Master Declaration which provide as follows:

### "ARBITRATION OF DISPUTES"

"5.3 Mandatory Binding Arbitration: Any Dispute between any Owner and Builder or between the Association and Builder shall be resolved through the procedures established in this Title 7 Master Declaration. . . .

"5.3.1 Federal Arbitration Act: If negotiations, mediation or other non-binding dispute resolution procedures, including the Formal Claim Process, fail to resolve the Dispute, then the Dispute shall be resolved by neutral, binding arbitration governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16) and not by any court action except as provided for judicial review of arbitration proceedings under the Federal Arbitration Act. . . . [¶] . . . [¶]"

#### "5.4 Other Dispute Provisions:

"5.4.1 Judicial Reference: To the extent that either party may be otherwise entitled to bring an action at law or if a court of competent jurisdiction determines that the dispute resolution procedure set forth in Section 5.3 is void or unenforceable, the entire matter shall proceed as one of judicial reference pursuant to California Code of Civil Procedure Section 638 et seq. . . .

"5.4.2 Waiver of Jury Trial: BY TRANSFERRING TITLE AND BY TAKING TITLE TO PROPERTY, DECLARANT PARTIES, THE ASSOCIATION AND EACH OWNER GIVE UP AND WAIVE ANY RIGHT TO HAVE ANY DISPUTE TRIED BEFORE A JURY."

Following the "Arbitration of Disputes" provisions, the Title 7 Addendum contains the following language:

<sup>2</sup> In their opposition to defendants' petition to compel arbitration and on appeal, plaintiffs denied receiving the Title 7 Master Declaration. In its ruling, the trial court acknowledged plaintiffs' contention that "they were not given any opportunity to see or review the Title 7 Master Declaration prior to their signatures on the Addendum agreeing that they did." The court's analysis, however, included a discussion of the Title 7 Master Declaration. For purposes of our analysis, we too shall assume, without deciding, that plaintiffs received a copy of the Title 7 Master Declaration before signing the Title 7 Addendum.

**"STATUTORY NOTICE:**

"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT THE MATTERS [sic] INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."

This language is followed by space for the buyer's, seller's, and affiliated general contractor's initials, all of which were initialed in each Title 7 Addendum.

Near the conclusion of the Title 7 Addendum, under the heading "16. BUYER ACKNOWLEDGEMENT OF REVIEW," the plaintiffs each initialed their copy in acknowledgement "that a complete copy of this Addendum and all documents attached to this Addendum were provided to Buyer for review on [date received inserted]. The reason for the delay between that date and the date of this Addendum was to permit Buyer to thoroughly review this Addendum and all documents attached to this Addendum. By signing this Addendum, Buyer agrees that it has been provided adequate opportunity to read and review this Addendum and all documents attached to this Addendum and that Buyer agrees to abide by all of the terms of this Addendum and all documents attached to this Addendum." On the last page of the Title 7 Addendum, Toll Dublin, Toll Brothers, and each plaintiff signed and dated the document.

The Title 7 Master Declaration, a 17-page document, which includes the "Arbitration of Disputes" provisions quoted in the Title 7 Addendum, defines the term "dispute" as follows:

**"2.10 DISPUTE:** The term 'Dispute' shall mean any claim, issue or controversy that arises

from or is related in any way to (i) the Project, (ii) the relationship between Owner and Builder, or (iii) the relationship between the Association and Builder, whether contractual, statutory or in tort. The term 'Dispute' includes, but is not limited to claims, issues or controversies that arise from or are related to the purchase, sale, condition, design, construction or materials used in construction of any portion of the Project, the agreement between Declarant and an Owner to purchase a Condominium or any related agreement, an Enhanced Protection Agreement, a Fit & Finish Warranty, disclosures, or Issues. Disputes specifically include those relating to or arising out of any of the following:

**"2.10.1 CLAIMED TITLE 7 VIOLATION:** A claimed Title 7 Violation;

**"2.10.2 PROPER REPAIR:** Any disagreement as to whether a Claimed Title 7 Violation has been properly repaired;

**"2.10.3 DAMAGES:** Any disagreement as to the value of repairing a Claimed Title 7 Violation, the cost of repairing damage caused by the repair efforts... and all other fees and costs recoverable by contract or statute as a result of the Claimed Title 7 Violation; and

**"2.10.4 TIMELINESS:** Any disagreement concerning the timeliness of Builder's performance or an Owner's or the Association's notification under a Fit & Finish Warranty, an Enhanced Protection Agreement or the Formal Claim Process."

Only Toll Dublin and Toll Brothers signed this document, which was recorded on January 15, 2004, more than two years before any plaintiff closed escrow on a home.

The CC&Rs, a 40-page document (not including exhibits), which was recorded on May 23, 2003, also contains an arbitration provision, as follows:

**"10.3 DISPUTES INVOLVING DECLARANT:** Any disputes, claims, issues or controversies between any Owner and Declarant or between the Association and Declarant regarding any matters that arise from or are in any way related to the Project, the relationship between Owner and Declarant or the relationship between the Association and Declarant, whether contractual or tort, including, but not limited to, the purchase, sale, condition, design, construction or materials used in construction of any portion of the Project, the agreement between Declarant [and] Owner to purchase a Condominium or any related agreement, any Claimed Title 7 Violation as defined in the Title 7 Master Declaration or a deficiency as that term is defined in Section 896 of the California Civil Code shall be resolved in accordance with the Claims Processes and Dispute Resolution Procedures established in the applicable Title 7 Master Declaration."

A copy of Title 7, the statutory scheme contained in Civil Code section 895 et seq., which is concerned with construction defect claims, was also provided to plaintiffs and contains a provision that expressly excludes fraud claims: "[T]his title does not apply to any action by a claimant

to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of statute." (Civ. Code, § 943, subd. (a); see also *id.*, § 931 [this part does not cover, *inter alia*, "fraud-based claims"].)

### B. The Trial Court's Ruling

The trial court denied defendants' motion to compel, concluding that the arbitration agreement was applicable only to claims brought pursuant to Title 7. The court first noted that the Title 7 Addendum states in its first paragraph that "[t]his Addendum and all of the documents attached to it exist for the purpose of implementing the requirements of Title 7." The court found that "[t]his language cannot be interpreted in any way other than that, unless specifically exempted by specific language in the Title 7 Addendum, the purpose of the Title 7 Addendum is for the sole purpose of implementing each of the requirements of Civil Code §§ 895–945.5. [¶] An analysis of the statutory scheme supports the conclusion that the claims at issue in this case are not subject to arbitration." The court then observed that "Title 7 concerns itself exclusively with actions relating to construction defects in new construction projects" and that causes of action for, *inter alia*, fraud were explicitly excluded from Title 7's statutory scheme. (See Civ. Code, §§ 931, 943.)

The court then stated that the contractual language of the Title 7 Addendum also supported its conclusion that the claims at issue were not subject to arbitration since, "[u]nlike the specific reference found in paragraph 3 of the Title 7 Addendum where it states that 'Seller . . . has elected not to be subject to the provisions of Chapter 2 of Title 7' (Civil Code §§ 896-897), there is no language in the Title 7 Addendum stating that the breadth of disputes covered by the arbitration agreement found in paragraph 10 of the Title 7 Addendum is different or contrary to the rather specific language found in Civil Code §§ 931 or 943."

The court then stated that the language in paragraph 10 of the Title 7 Addendum regarding a "dispute [that] is not subject to the formal claims process" was, at best, ambiguous insofar as that language refers to "a construction defect dispute or if it is intended to include fraud claims notwithstanding their specific exclusion by Civil Code § 943. [¶] Compounding the ambiguity, the [Title 7 Master Declaration] defines, at paragraph 2.10, 'Dispute' in broad and general language and then explains it 'specifically' includes claims 'relating to or arising out of any of the following' and then lists four different types of claims, each of which relates directly to a construction defect type of dispute. . . . The Title 7 Master Declaration, in five, single-spaced pages . . . describes the 'Formal Claims Process' in exhaustive detail yet it never describes any act or process that could apply to any type of dispute other than one relating directly to a construction defect dispute." (Fn. omitted.)

The court concluded: "It is unreasonable to interpret the general language of either the Title 7 Addendum or the Title 7 Master

Declaration as contradicting or superseding the specific language found in Civil Code § 943 which operates to exclude the type of fraud action filed herein from the remedies and procedures required by Title 7. [¶] It directly follows that the arbitration provisions contained in the Title 7 Addendum and in the Title 7 Master Declaration do not apply to the claims alleged by Plaintiffs in their Complaint."

### II. Standard of Review

On appeal from the denial of a motion to compel arbitration, "we review the arbitration agreement *de novo* to determine whether it is legally enforceable, applying general principles of California contract law. [Citations.]" [Citation.]" (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892 (*Baker*).) Unconscionability is a question of law subject to *de novo* review, "although factual issues may bear on that determination. [Citation.]" (*Ibid.*; accord, *Murphy v. Check 'n Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144.)

### III. Breadth of the Arbitration Provisions

We agree with the trial court's conclusion, based on both the Title 7 statutory scheme and the contractual language of the agreement between the parties, that the dispute resolution provisions in the Title 7 Addendum and the Title 7 Master Declaration apply only to Title 7 claims. First, the Title 7 Addendum states that "[t]his Addendum and all of the documents attached to it exist for the purpose of implementing the requirements of Title 7," which is expressly limited to actions involving construction defects in new construction projects.

Second, although read in isolation, the provision in the Title 7 Addendum regarding disputes "not subject to the formal claims process" (¶ 10) and the broad definition of "Dispute" in the Title 7 Master Declaration (¶ 2.10) could possibly be read to apply to disputes other than Title 7-related actions, in the context of the entire arbitration agreement, these general provisions cannot reasonably be interpreted to apply to non-Title 7 claims. (See, e.g., *Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919 [on review, "we consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation"].) This is particularly true given the fact that the relevant documents' captions all refer to Title 7 and the specific language solely invokes Title 7, with no description of any possible claim other than those related to Title 7. (See, e.g., *McNeely v. Claremont Management Co.* (1962) 210 Cal.App.2d 749, 753 [where general and particular contract provision are inconsistent, particular controls general]; see also Code Civ. Proc., § 1859.)

Defendants argue that, in light of the strong policy in favor of arbitration and the mandate that doubts about the scope of arbitrable issues should be resolved in favor of arbitration (see, e.g., *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 25-26; *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311,

1320-1321), any doubt or ambiguity regarding whether the arbitration agreement does in fact cover plaintiffs' claims should be resolved in favor of those claims' arbitrability. We disagree. The strong policy in favor of arbitration may not be used to permit a party to enforce provisions of an arbitration agreement that, as here, either do not exist or were so poorly drafted that another party cannot be presumed to have agreed to them. (See, e.g., *EFund Capital Partners v. Pless*, at p. 1321 [“‘The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract [including an arbitration agreement] must give effect to the ‘mutual intention’ of the parties.’”], quoting *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27, italics added.)

Thus, because the agreement does not include non-Title 7 claims such as those raised in this action, we conclude the dispute resolution provisions in the Title 7 Addendum and the Title 7 Master Declaration do not apply to plaintiffs' action. (See *Baker, supra*, 159 Cal.App.4th at pp. 893-894.)<sup>3</sup>

Moreover, even assuming the arbitration provisions in question could somehow be construed to cover non-Title 7 claims, we would still affirm the trial court's order because the provisions are unconscionable and hence unenforceable.

#### IV. Unconscionability

Although the trial court's denial of defendants' motion to compel was not based on unconscionability, because the issue of unconscionability “is solely one of law [citation], is potentially dispositive, and because the parties' arguments on the issue are fully contained in the

record, we address the issue here.”<sup>4</sup> (*Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, 343.)

The doctrine of unconscionability “has both a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results. [Citation.] The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. [Citation.] But they need not be present in the same degree. . . . In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); see also Civ. Code, § 1670.5.)

In *Armendariz, supra*, 24 Cal.4th 83, our Supreme Court further explained that an unconscionability analysis “begins with an inquiry into whether the contract is one of adhesion. [Citation.] The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” [Citation.] If the contract is adhesive, the court must then determine whether other factors are present which, under established legal rules—legislative or judicial—operate to render it ‘unenforceable.’ [Citation.]” (*Id.* at p. 113.) The court went on to explain: “Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him. [Citation.] The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, is unduly oppressive or ‘unconscionable.’” [Citation.] Subsequent cases have referred to both the ‘reasonable expectations’ and the ‘oppressive’ limitations as being aspects of unconscionability. [Citations.]” (*Ibid.*)

Here, we conclude that the arbitration provisions in question were part of a contract of adhesion. “The reality of the transaction was that plaintiffs had to accept the arbitration provisions if they wanted to buy a house. The arbitration provisions were part of a preprinted form contract, presented on a take-it-or-leave-it basis.” (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1293 (*Bruni*), accord, *Pardue Construction Co. v.*

<sup>3</sup> Defendants mistakenly rely on Civil Code section 914, subdivision (b), which provides: “Nothing in this title is intended to affect existing statutory or decisional law pertaining to the applicability, viability, or enforceability of alternative dispute resolution methods, alternative remedies, or contractual arbitration, judicial reference, or similar procedures requiring a binding resolution to enforce the other chapters of this title or any other disputes between homeowners and builders. Nothing in this title is intended to affect the applicability, viability, or enforceability, if any, of contractual arbitration or judicial reference after a nonadversarial procedure or provision has been completed.” (Italics added.) According to defendants, the trial court improperly ignored this section when it found that non-Title 7 claims were precluded from Title 7's statutory scheme.

We do not believe the trial court's ruling implies that whenever provisions related to Title 7 construction defect claims are included in an arbitration agreement, no non-Title 7 dispute provisions may also be included in that agreement. Clearly, inclusion of such provisions is permitted. (See Civ. Code, § 914, subd. (b).) In the particular circumstances of this case, however, the trial court correctly concluded that the language of the arbitration agreement does not include non-Title 7 claims but, rather, applies only to Title 7-related disputes, which expressly exclude fraud-related claims of the type raised here. (See Civ. Code, §§ 931, 943.)

<sup>4</sup> While, as previously noted, there is a factual dispute as to whether the plaintiffs received the Title 7 Master Declaration before signing the Title 7 Addendum, resolution of that dispute is not necessary to our unconscionability determination.

Superior Court (2002) 100 Cal.App.4th 1081, 1087 (*Pardee*).) Indeed, as previously noted, the Title 7 Master Declaration was signed solely by Toll Dublin and Toll Brothers and was recorded on January 15, 2004, more than two years before any plaintiff closed escrow on a home, which strongly suggests that these provisions were imposed on all buyers of the 264-home project.

These facts also demonstrate "oppression," which "arises from an inequality of bargaining power of the parties to the contact and an absence of real negotiation or a meaningful choice on the part of the weaker party." (*Pardee*, *supra*, 100 Cal.App.4th at p. 1089; accord, *Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 828-829 [where CC&Rs containing arbitration provisions "were drafted in toto by the developer and recorded years before the purchasers ever came to buy," oppression component of unconscionability was demonstrated]; compare *Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 958-959 [finding no procedural unconscionability where there was no evidence, *inter alia*, that contested dispute resolution provision was included in every purchase agreement within development].)

Furthermore, the arbitration provisions, on their face, applied to a limited category of actions—Title 7 claims—and were included in approximately 800 pages of documents that were given to plaintiffs, which together comprised the purchase agreement. These facts reflect the "surprise" component of procedural unconscionability. (See *Pardee*, *supra*, 100 Cal.App.4th at pp. 1089-1090 [relevant provisions were buried in contract, language did not fully explain provisions, and one provision contained a misleading caption].)

Accordingly, in this contract of adhesion, oppression and surprise due to unequal bargaining power are both present, rendering the arbitration provisions procedurally unconscionable. (See *Armendariz*, *supra*, 24 Cal.4th at pp. 113-114.)

In addition, substantive unconscionability is present here. The purported inclusion of non-Title 7 claims in the arbitration provisions (see pt. III, *ante*), rendered the scope of the arbitration provisions unforeseeably broad, which would not have been within the reasonable expectations of the plaintiffs. (See *Bruni*, *supra*, 160 Cal.App.4th at p. 1293.) Given that both the trial court and this court have concluded that the arbitration provisions, on their face, covered only Title 7 claims, to uphold defendants' interpretation that these provisions in fact included fraud-related claims would undoubtedly "shock the conscience." (See *id.* at pp. 1288-1289.) Finally, the arbitration provisions are unfairly one-sided in that defendants, "as the builder and seller of plaintiffs' homes, would have no conceivable reason to institute legal proceedings against a homeowner after escrow closed, but virtually every claim the homeowners might raise against [the builder and seller] would be subject to arbitration." (*Baker*, *supra*, 159 Cal.App.4th at p. 896.)

In light of the pervasiveness of the unconscionable provisions related to arbitration

and the fact that the purported scope of the arbitration provisions exceeded the plaintiffs' reasonable expectations, there are no isolated provisions that can be severed and the arbitration provisions as a whole are unenforceable against plaintiffs. (See *Armendariz*, *supra*, 24 Cal.4th at p. 124 ["If the central purpose of the contract is tainted with illegality, then the contact as a whole cannot be enforced"]; see also *Bruni*, *supra*, 160 Cal.App.4th at p. 1295; Civ. Code, § 1670.5.)<sup>5</sup>

## DISPOSITION

The trial court's order denying the motion to compel arbitration is affirmed. Costs on appeal are awarded to plaintiffs.

Kline, P.J.

We concur:

Haerle, J.  
Richman, J.

Trial Court:

Alameda County Superior Court

Trial Judge:

Hon. Frank Roesch

Attorneys for Appellants:

Morgan Miller Blair, a Law Corporation  
Kenneth M. Miller  
Steven N. Holland  
Kevin R. Brodehl

Attorneys for Respondents:

Berding & Weil LLP  
Scott W. Barton  
Steven R. Weinmann

<sup>5</sup> In their reply brief, defendants assert that, if we should find that the arbitration provisions do not govern plaintiffs' claims, the Title 7 Addendum requires that the claims be submitted to judicial reference. First, we will not consider an argument first raised in a reply brief absent a showing why the issue could not have been raised earlier. (See, e.g., *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 900.) Second, just as we have found that the arbitration provisions in the Title 7 Addendum and Title 7 Master Declaration do not apply to plaintiffs' claims, but instead are limited to Title 7-related issues, for the same reasons, we conclude that the judicial reference provisions in those same documents (located together with the arbitration provisions under the headings "Alternative Dispute Resolution Procedures" and "Arbitration of Disputes") are inapplicable to plaintiffs' non-Title 7 claims.

In addition, given our conclusion that the dispute resolution provisions do not apply to non-Title 7 claims and, further, that the arbitration agreement was unconscionable, we need not address plaintiffs' additional argument that the arbitration agreement was fraudulently procured.